UNITED STATES
v.
N. A. WHITTAKER,
MURIEL WHITTAKER, AND
HOWARD WHITTAKER

IBLA 73-335 Decided August 3, 1973

Appeal from Administrative Law Judge Graydon E. Holt's decision of March 9, 1973, in contest Nos. A 6165, 6171, and 7157, declaring mining claims invalid for lack of discovery.

Dismissed.

Mining Claims: Contests -- Mining Claims: Hearings

> Where the Government appeared and presented evidence at a hearing conducted in a contest proceeding challenging the validity of certain mining claims, and the contestee after ample notice failed to appear at the hearing, the Administrative Law Judge properly rendered a decision based on the record made at the hearing.

Rule of Practice: Appeals: Statement of Reasons

> Where a decision is rendered upon the record made at a hearing in a contest proceeding, a statement of reasons on appeal must state the asserted errors in that decision. Where a statement of reasons does not assert any errors, the appeal is subject to summary dismissal. New evidence submitted by way of appeal may only be considered as a motion for a new hearing.

APPEARANCES: Norman A. Whittaker, pro se; Fritz L. Goreham, Esq., Office of the Solicitor, Department of the Interior, Phoenix, Arizona.

OPINION BY MR. FRISHBERG

The above identified contest proceedings were initiated by service of complaints charging, in substance, that the mining claims

involved were null and void for lack of discovery. Although appellants timely denied the charges, and although the original hearing date was rescheduled for appellants' convenience, they failed to appear at the hearing. After the Government presented its evidence the hearing was closed. Judge Holt, on the basis of the record, found that the Government established a prima facie case of lack of discovery, and held each of the mining claims null and void. This appeal followed.

The rules of practice, 43 CFR 4.450-7, provide that if an answer to a complaint is not timely filed, the charges will be taken as confessed and the case will be decided without a hearing. The rules do not provide that non-appearance at the time of hearing will result in a decision against the non-appearing party. Cf. Rule 55, Rules of Civil Procedure, 28 U.S.C. Appendix (1970). The Department has long adhered to the practice that after issue has been joined by timely denial to allegations of lack of discovery in a contest complaint, the contestant must establish a prima facie case of no discovery at the hearing. This the Government did.

Appellants assert that they made a discovery on each of the claims, that the Government improperly examined the claims, that the claims have been mined for many years and that annual assessment work is current. They submitted a number of printed articles, maps, and other evidence indicating that the claims are in a generally mineralized area. But nowhere in the statement of reasons do they point out where Judge Holt's decision, based on the evidence of record, was in error. Under such circumstances, the appeal is subject to summary dismissal. 43 CFR 4.402; R. C. Bailey, 10 IBLA 281 (1973); United States v. Maus, 6 IBLA 164 (1972); United States v. Heyser, 75 I.D. 14 (1968); Duncan Miller, 65 I.D. 290 (1958).

Nevertheless, because of appellants' allegations and submissions we have considered the appeal as a motion to set aside the decision and to permit a new hearing. If the non-appearance was occasioned because of mistake, inadvertence, surprise or excusable neglect, or if there is newly discovered evidence which by due diligence could not have been produced at an earlier date, or if there was fraud, misrepresentation or other misconduct by the adverse party, or if there is any other reason justifying relief, we would order a new hearing. Cf. Rules 55(c), 60(b), Rules of Civil Procedure, 28 U.S.C. Appendix (1970).

There is nothing in the record to indicate that appellants' default was excusable or justifiable. Furthermore, appellants' arguments do not indicate that they could demonstrate discoveries. Their attention is directed to Rough Rider, 43 L.D. 584 (1913), which makes clear that a discovery will not be inferred merely because land is in a generally mineralized area where similar surface indications have led to discoveries, and to the several cases cited

by Judge Holt. We reiterate the rule of discovery as stated in Castle v. Womble, 19 L.D. 455 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine the requirements of the statutes has been met.

Nothing submitted by appellants would indicate the probability that further expenditure of labor and means would be justified in the instant case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Newton Frishberg, Chairman

We concur:

Frederick Fishman, Member

Douglas E. Henriques, Member